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IN THE

Supreme Court of The United States

NO. 425

OCTOBER TERM, 1961

WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL and AMOS HARRIS, JR.,

Appellants,

-vs-

STATE OF FLORIDA,

Appellee.

RESPONSE TO ISSUE OF EXISTENCE OF INDEPENDENT NON-FEDERAL GROUND ADEQUATE TO SUPPORT JUDGMENT OF THE SUPREME COURT OF FLORIDA

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Appellee contends and will demonstrate that the Supreme Court of Florida in dismissing appellants' appeal by its order of May 5, 1961, and denying rehearing on June 6, 1961, had adequate state grounds upon which to so rule.

The Court's attention is invited to its recent decision in the case of *Durley v. Mayo*, 351 U.S. 277, 100 L.Ed. 1178, 76 S.Ct. 806, in which it concluded that the Florida Supreme Court, in denying the petitioner relief by habeas corpus, rested its decision on adequate state grounds;

they being respectively statutory *res adjudicata* (*Section 79.10, Florida Statutes*) and substantive or case law *res adjudicata* (*Washington v. Mayo*, (Fla.), 77 So. 2d 620, 621).

That either or both of the bases for the application of that doctrine by the Supreme Court of Florida was an adequate state ground in this Court's view needs no further saying.

In the instant proceedings we are concerned neither with a statutory pronouncement nor with a case law interpretation of any principle of state law, but rather with the highest form of law to which one can turn in the State of Florida; a constitutional provision, to-wit: *Article V, Section 4 (2)*, the pertinent provisions of which read as follows:

"§ 4. *Supreme Court*

* * *

"(2) *Jurisdiction*

* * *

"Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. * * *"

The matter quoted above, was adopted as a constitutional amendment in the general election held on November 6, 1956, to take effect on July 1, 1957. By its

advent, the people of the State of Florida approved the precise manner and mode in which all litigants must seek appellate review in the Supreme Court of Florida. This effectively supplanted all other means by which that review could theretofore be secured. At this writing, the procedure delineated therein remains inviolate.

The appellants specifically elected to seek review in the Florida Supreme Court by *appeal* under and by virtue of what they contend is a vested right assured them by *Section 4 of the Declaration of Rights of the Florida Constitution,* to-wit:

> "§ 4 *Courts to be open; remedies guaranteed*
> "Section 4. All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, *by due course of law,* and right and justice shall be administered with out sale, denial or delay." (Emphasis supplied)

The phrase "*by due course of law*" has been discussed by the Supreme Court of Florida in the case of *State ex rel. Gore v. Chillingsworth*, 126 Fla. 645, 171 So. 649, 654. From a reading of the *Chillingsworth* case, supra, it does not take any stretch of judicial reason to quickly determine that that portion of the Bill of Rights of the Florida Constitution upon which appellants would found their right to appeal merely contemplates that due process of law guarantees to every citizen the right to have only that course of legal procedure which has been established in our judicial system for the protection and enforcement of their rights

It should be clear that *Section 4*, supra, neither says nor contemplates that litigants who feel themselves aggrieved by some judicial pronouncement are free to run helter-skelter to any court that may happen to suit their fancy with a cavalier disregard for a constitutional amendment which specifically spells out not only when and if but as well, where an appeal shall be perfected.

The provisions of *Article V, Section 4 (2)*, supra, are a constitutional commandment created by the citizens of the State of Florida binding on everyone touched thereby in every sense of the word. The article in question deprives no one of review no matter what his circumstances—it rather brings into focus that which theretofore may have been nebulous. Its pertinent provisions spell out the precise bases upon which a litigant aggrieved by a decision of a district court of appeal may seek review in the Florida Supreme Court (specifically by appeal).

In appellee's stand before the Florida Supreme Court, we noted that it could not be urged (indeed appellants specifically did not) that the district court of appeal (by its per curiam affirmance) initially passed upon the validity of a state statute.

We further contended that it could not be urged (indeed appellants specifically did not) that the district court of appeal (by its per curiam affirmance) initially passed upon the validity of a federal statute.

We further contended that it certainly could not be urged (indeed appellants specifically did not) that the

district court of appeal initially passed upon the validity of a federal treaty. Appellee here notes that no federal treaty is in anywise connected with any aspect of this case from its birth to this date.

En fine, we contended that it certainly could not be urged (indeed appellants specifically did not) that the district court of appeal (by its per curiam affirmance) initially construed a controlling provision of either the Florida or Federal Constitution.

So it was that appellants were faced with the constitutional requirement impressed upon them (*Article V, Section 4 (2)*) that required a specific assertion that either of the several enumerated prequisites in fact occurred (of course supported by record evidence thereof) in order to secure review in the Florida Supreme Court by appeal. That they have not done that which all litigants must do who seek such review is, we submit, beyond cavil.

Having so failed, it is almost idle to suggest that appellants were free to seek that same review by appeal under the alleged aegis of *Section 4 of the Declaration of Rights*, supra, upon the mythical theory that this bit of writing was a niche into which aggrieved litigants could stuff themselves if they were so unfortunate as to be unable to bring themselves within the well-ordered confines of *Article V, Section 4 (2)*, supra.

As was stated before the Florida Supreme Court, perhaps the most alarming aspect of the position appellants

would have this Court believe justified a review of their grievances by the Supreme Court of Florida (on appeal) is their claim that since they had raised what they believed were adequate questions touching upon both the federal and state constitutions that they had an absolute right to have the trial court and/or the district court of appeal pass upon those questions in precisely the manner necessary to justify them in seeking the review in question.

They further contended that simply because neither of the aforementioned courts either found it necessary or chose to pen such words as would justify a review by appeal, they should not have been precluded from receiving that which they might have had if either of said courts had elected or found it necessary to do any of the things required by the constitutional amendment before the Florida Supreme Court would grant review by appeal. We contended then and do now that this is a classic example of the tail wagging the dog.

The record furnished this Court by appellants and particularly their pleadings and brief in support of their position demonstrates an absolute failure to prove, claim, allege or even show any interest in a review of the district court's per curiam opinion under the appropriate provisions of *Article V, Section 4 (2)*, supra. That such specifics are absolutely required in order to seek review by appeal in the Florida Supreme Court is beyond question. With reference to this purely procedural constitu-

tional requirement setting out the jurisdiction of the Florida Supreme Court to review district courts of appeal by appeal, it can be said that the Florida Supreme Court has, from time to time, been required to edify the bar of the State of Florida by repetitious and occasionally exhaustive opinions anent the point.

Certainly the most penetrating is the case of *In Re Kionka's Estate*, (Fla.), 121 So. 2d 644; an illuminating opinion wherein the Florida Supreme Court determines the circumstances under which it can and will review (on appeal) a decision of a district court of appeal. In so doing, it merely recites and interprets purely Florida law governing appellate procedure in this state. To substantially the same effect are the cases of *State v. Furen*, Fla., 118 So. 2d 6; *Engel v. City of North Miami*, Fla., 115 So. 2d 1; *Bluesten v. Florida Real Estate Commission*, Fla., 125 So. 2d 567; and *City of Miami Beach v. State*, Fla., 111 So. 2d 437, 438.

Appellee notes that in the *City of Miami Beach* case, supra, the Florida Supreme Court said the following:

> "Upon consideration of the matter and an examination of the record and briefs in said causes, we fail to find that the subject decision of the District Court of Appeal initially passed upon the validity of any of the statutes and that, therefore, this Court is without jurisdiction to entertain the appeal and the same is hereby dismissed *ex mero motu*." (Emphasis supplied)

This Court should quickly note that that is precisely the disposition which the Florida Supreme Court made of appellants' appeal.

Based on the matters set out above with reference to the constitutional requisites imposed on litigants seeking a review by appeal in the Florida Supreme Court, it is respectfully submitted that the human imagination could not envisage a situation with less legitimate basis for seeking review by appeal than that which appellants lamely presented to the Florida Supreme Court.

Returning to this Court's decision in the *Durley* case, supra; we find the legal fiction of *res adjudicata* as embodied in *Section 79.10*, supra, and Florida case law, to-wit: *Washington v. Mayo*, supra, neither one of which being possessed of the stature of a constitutional amendment; was considered by this Court as an adequate state ground upon which the Florida Supreme Court could summarily dismiss Durley's petition for habeas corpus.

It is therefore certainly no departure and indeed not even a step forward to conclude that the compulsion of a constitutional amendment prescribing just how Florida litigants in Florida cases involving Florida law (federal law only incidently as it may be raised) shall proceed to seek review in the Supreme Court of Florida by appeal.

The almost basic English pronouncements of *Article V, Section 4 (2)*, supra, do not present an obtuse writing incapable of being deciphered. No mystical qualities attach to it nor is it shrouded in doubt. It is simply a mandatory requirement which applies without exception to all who seek to come thereunder. Ergo, the Supreme Court

of Florida in dismissing the appeal in this cause merely took notice of a complete failure or, as the case may be, refusal, by or on behalf of appellants to proceed in conformity therewith.

Nor need this Court consider that the Supreme Court of Florida *might* have rested its order of dismissal on an adequate state ground as was the case in *Durley v. Mayo*, supra. It may be categorically stated and appellee so does, that the order of the Supreme Court of Florida in question was in fact founded upon state grounds which are conclusively adequate.

If it be urged (appellants do not) that the Florida Supreme Court should have treated their futile attempt at appeal as a petition for certiorari, there is perhaps even less basis upon which they may complain here. The appropriate section of *Article V, Section 4 (2)*, supra, carefully and clearly delineates the procedure to be followed by litigants seeking certiorari review in the Florida Supreme Court from a decision of a district court of appeal. That provision reads as follows:

"§ 4. *Supreme Court*

* * *

"(2) *Jurisdiction.*

* * *

". . . The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of

another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

At the outset, appellee deems it appropriate to acknowledge that the district court of appeal rendered a per curiam decision (affirmed) without opinion. On the several occasions wherein the Florida Supreme Court has been asked to review by certiorari a per curiam affirmance without opinion they have, almost without exception, consistently refused to extend such review for a multitude of reasons, all of them constitutionally embedded.

A pungent rejection of appellate liberality in cases where certiorari review was sought of a per curiam decision without opinion, was rendered by the Florida Supreme Court in the case of *Carmazi v. Board of County Commissioners*, (Fla.), 104 So. 2d 727. Mr. Justice Drew, specially concurred, quoted from the case of *Thompson v. State*, 199 Ga. 250, 33 S.E. 2d 903, and concluded that the construction contemplated by our Constitution (*Article V, Section 4 (2)*—as quoted above) did not include the mere application of facts to constitutional provisions, but rather required such construction as would at least touch on the meaning of some provision of the Constitution directly in question—precisely what neither the trial court nor the district court of appeal in this case were required to or did in fact do.

Without regard to the number of times this Court may read appellants' pleadings seeking appeal in the

Florida Supreme Court, appellee proclaims that nowhere within the confines of that portion of the record could one divine (intelligently, that is) any claim, whether accurate or otherwise, which would comport with the specific requirements of *Article V, Section 4 (2)*, supra

It should be clear that a per curiam decision without opinion such as appellants sought to have reviewed by the Florida Supreme Court did not affect a class of constitutional or state officers. It should be equally clear that that same decision did not pass upon a question certified by said district court of appeal to be of great public interest. It seems inconceivable that appellants could possibly urge that said decision was in direct conflict with a decision of another district court of appeal or of the Florida Supreme Court on the same point of law.

These jurisdictional prerequisites which must be alleged in a well-drawn petition intentionally requesting certiorari, if said petition is to be considered by the Florida Supreme Court, are at least as necessary to, and in fact are prerequisites imposed on parties improvidently seeking review in that court by appeal. To hold otherwise would invite mislabelled or misdirected appellate pleadings thereby requiring the Florida Supreme Court to not only read the entire record but conclude for the appellant what he should have said in order that it in turn could consider whether to grant a particular form of review. Again this becomes a case of the tail wagging the dog.

Appellee is not yet acquainted with any judicial pronouncement in this land which requires the highest state

court to plead correctly for appellants who were represented by well-qualified and able counsel (at one stage of the proceedings, five attorneys) who specifically elected or refused as the case may be, to proceed in the manner directed by the Constitution of the State of Florida

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There are a host of cases in which the Supreme Court of the State of Florida has justified declining to review a per curiam decision of a district court of appeal by certiorari. The first of these is the case of *Lake v. Lake*, Fla., 103 So. 2d 639. The decision in the *Lake* case, supra, should be dispositive of this aspect of the matter before this Court. The principle announced by the *Lake* case, supra, is ably supported by the Supreme Court's opinion in the case of *South Florida Hospital Corporation v. McCrea* Fla., 118 So. 2d 25, 27, when it said the following:

> "At the risk of being tedious, we will again reiterate that unless we find a conflict in decisions of other appellate courts of this state on the point or points of law pronounced in the opinion of the District Court of Appeal in this case, we have no power or jurisdiction in any manner to disturb the judgment of the lower court. Courts of Appeal are and were meant to be courts of final appellate jurisdiction in the vast majority of cases, and in cases such as the one at bar it is only to harmonize and standardize decisions that this court may presume to interfere. As said by Mr. Justice Thomas in Lake v. Lake, supra:
>
> " 'Sustaining the dignity of the decisions of the district courts of appeal must depend largely on

> the determination of the Supreme Court not to venture beyond the limitations of its own powers by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case'.
>
> "We therefore initially refrain from scrutinizing the action of the trial court or of the Court of Appeal as to the effect on the parties to the cause. If what was decided finds no contradiction in what this court or another District Court has said in their official pronouncements on the same point or points of law, then our authorized examination is complete and the writ of certiorari will be discharged. If there is contradiction we will undertake to resolve the conflict."

See also *Ansin v. Thurston*, Fla., 101 So. 2d 808; *Seaboard Airline Railroad Company v. Branham*, Fla., 104 So. 2d 356, and *Hakam v. City of Miami Beach*, Fla., 108 So. 2d 608.

So it is that appellants; confronted with the unequivocal notation of the district court of appeal rendered on July 26, 1960, as follows:

"PER CURIAM.

Affirmed."

were constitutionally bound to follow the specific requirements of *Article V, Section 4 (2)*, in seeking only that review to which they were in fact entitled. Viewed within the framework of the certiorari which they never sought, it can be said, based upon the above, that they

could make no legitimate claim for review in that fashion. Certainly their pleadings could never be said to have limmed the specific requirements of the aforesaid constitutional amendment with reference to appeals from the district courts of appeal.

Unless this Court should elect to nevertheless consider the search and seizure question involved on the theory that its decision might be a decided boon to the bench and bar of the entire nation (considering the apparent void which exists between the cases of *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 and *Silverman v. United States*, 365 U.S. 505, 5 L.Ed. (2d), 743, 81 S.Ct. 679), it is respectfully submitted that the Supreme Court of Florida dismissed the appeal in this cause on a most adequate state ground.

Moreover, though it did not elect to consider the improperly labeled pleadings as a petition for certiorari, that decision as well was founded upon an eminently adequate state ground. (See citations ante)

Inasmuch as the petition for rehearing introduced no material even remotely capable of altering the hopeless deficiencies for which only appellants may be held responsible, every position heretofore assumed by appellee with reference to the adequacy of the state grounds upon which the Supreme Court of Florida clearly and correctly ruled as it did, is of equal applicability to said petition for rehearing.

CONCLUSION

The proceedings pursuant to which appellants seek this Court's intercession should, if they be characterized an appeal—be dismissed; if characterized a petition for writ of certiorari—be denied; and the judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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Assistant Attorney General

Counsel for the Appellee.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing appellee's Response to Issue of Existence of Independent Non-federal Ground Adequate to Support Judgment of the Supreme Court of Florida to the Honorable A. K. Black, Attorney at Law, Lake City, Florida, counsel for the appellants, by mail, this ..... day of March, 1962.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Appellee.